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The Contested Value of Normative Legal Scholarship

Robin West

A part of the contemporary skepticism about the value of a *legal education* and, more broadly, the value of the legal academy is focused on the perceived lack of value in *legal scholarship*: scholarship that, as currently configured, is a part of the legal academy's mission and, certainly alongside law school graduates, its major product. Legal scholarship is under attack from critics inside the legal academy itself,¹ from the other departments and parts of the university, and perhaps most publicly from the bench and bar.² The bill of particulars, unsurprisingly, given the multitudes against it, is lengthy and internally contradictory. According to its critics from the bench and bar, legal scholarship is overly precious: It is excessively "theoretical," self-consciously interdisciplinary, not grounded in the "real world," increasingly esoteric, and

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1. See, e.g., PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999) (criticizing normative legal scholarship for participating in law rather than studying it); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982) (criticizing all critical legal scholarship); Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 141 (2001) (criticizing all normative legal scholarship); Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening*, 97 GEO. L.J. 803 (2009) (criticizing legal scholarship as sycophancy and mediocrity that mimics the bench); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983) (criticizing traditional legal scholarship as a worshipping of false idols).
2. See, e.g., Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011) http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=0. Chief Justice Roberts famously complained at a Fourth Circuit Judicial Conference meeting in 2011 that "the first article [in any law review] is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar." J. Harvie Wilkinson III, *A Conversation with Chief Justice Roberts*, C-SPAN (June 25, 2011), www.c-span.org/video/?300203-1/conversation-chief-justice-roberts. See also Ronald K.L. Collins, *On Legal Scholarship: Questions for Judge Harry T. Edwards*, 65 J. LEGAL EDUC. 637 (2016); *Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship*, ACS BLOG (July 5, 2011), <http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99take-on-academic-scholarship>; Brian Leiter, *David Segal's Hatchet Job on Law Schools*, BRIAN LEITER'S LAW SCH. REPORTS (Nov. 20, 2011), <http://leiterlawschool.typepad.com/leiter/2011/11/another-hatchet-job-on-law-schools.html>.

not particularly useful to either judges or lawyers. It is therefore of no value.³ On the other hand, according to critics from other parts of the academy, legal scholarship suffers from almost precisely the opposite flaw: The student-edited law reviews are filled with *faux* scholarship that virtually by definition is insufficiently disciplined, woefully undertheorized, and overly utilitarian.⁴ Collectively, it aims to make a better legal mousetrap, but adds little or nothing to our store of knowledge about the world.

From *within* the legal academy, the criticisms are somewhat more precise, because better-informed by a knowledge of the nature of the beast, but they parallel those made by outside critics from the bench, bar and academy. And they too are internally contradictory. One group of critics from within the legal academy—I’ll call them the scholarly purists—charge that too much of our legal scholarship—and particularly doctrinal scholarship, which is, still, most legal scholarship—is overly “normative.”⁵ Its aim is to make the law better, rather than to explain or describe subtle or nonobvious features of law or the legal system. Therefore, say the scholarly purists, it is not truly scholarship; rather, it is political posturing under the guise of scholarship. *True* historians, after all, don’t tag policy prescriptions onto their historical analyses. Empiricists of all stripes, quantitative and qualitative, aim for truth, not reform or justice or the good, in their writing. Even philosophers aim to clarify, not dictate, what those philosopher kings might think, or what they have thought in the past, and so on. So “normative legal scholarship”—the type of scholarship that says “the law is x but it ought to be y”—to the scholarly purists is oxymoronic. To whatever degree it is “normative,” it’s not “scholarly.” As we—legal “scholars”—seek to mold, or shape, or reshape, or reform, or radically alter law, in the pages of our law reviews, we undercut or betray our scholarly ambitions.

A second camp of critics, still within the legal academy, I’ll call the “legal” or “professional” purists. For the legal purists, legal scholarship *must* be normative—legal scholarship, if it is to be truly “legal,” must aim to engage the professional work of either improving the law or preserving its goodness. It must aim to engage the law from what is sometimes called the “internal perspective,” and the internal perspective of law, whatever may be true of other subjects, simply *is* normative, through and through. For these critics, too much contemporary legal scholarship—and particularly, these days, the work done by legal empiricists of various stripes—may well be “scholarship” *about* law, in some sense, and may as such be of interest to colleagues in other parts of

3. See Edwards, *supra* note 2; Collins, *supra* note 2 at 645, 656.

4. These complaints from academics in other parts of the academy are rarely stated in print. For a recent exception, however, see Christopher Chabris & Joshua Hart, *How Not to Explain Success*, N.Y. TIMES (Apr. 8, 2016), <http://www.nytimes.com/2016/04/10/opinion/sunday/how-not-to-explain-success.html> (reviewing AMY CHUA & JED RUBENFELD, *THE TRIPLE PACKAGE: HOW THREE UNLIKELY TRAITS EXPLAIN THE RISE AND FALL OF CULTURAL GROUPS IN AMERICA* (2014)) (noting that according to the anonymous reviewers of their review essay, the book under review by two law professors was not worthy of an essay, as it was written by law professors with no expertise in empirical methods).

5. See, e.g., Schlag, *supra* note 1; KAHN, *THE CULTURAL STUDY OF LAW*, *supra* note 1.

the university, but it is not truly *legal* scholarship, and precisely because it has no normative bite.⁶ Legal scholarship must be “internal” to the legal system and the legal profession; it must engage the law on its own terms. Therefore, much of the current work on law informed by methods and insights from other disciplines, although perhaps of interest, isn’t legal scholarship: not because it isn’t scholarly, but because it isn’t truly legal.

So, to summarize and simplify, according to one of these various camps of either internal or external critics, much of what we call “legal scholarship” may be scholarship but it’s not “law”—it is too academic, too disciplined, too theoretic, and too detached, of no use to the profession and therefore of no value; or, according to another camp, much of what we call legal scholarship may be “legal” but it’s not true scholarship—it’s nothing but legal writing in disguise, elaborated memoranda for courts, legislators, or regulators, but it’s not scholarship. Legal scholarship, in short, is on the horns of a “normativity” dilemma. To some critics, legal scholarship isn’t scholarship, because it’s too normative, while to another camp, it may be scholarship, but it isn’t legal because it’s not normative enough. For every critique, both inside and outside the academy, one can find its opposite, also forcefully voiced. Legal scholarship does not want for critics.

I won’t take on all of these critics, although I do hope to in some detail in a forthcoming book. Here I want to address only one of these complaints, as voiced by critics of legal scholarship in the legal academy, and echoed by critics from other parts of the university: to wit, that legal scholarship is somehow not “true scholarship,” because so much of it is overtly *normative*. Legal scholarship, according to this strand of criticism, isn’t true scholarship because of the dominance of “ought” statements: If it aims to improve the law, or the world law governs, and aims to do so through using legal materials and a legal methodology, it isn’t scholarship.⁷ So—we shouldn’t do it. As Stanley Fish pithily put the point, we should “save the world on our own time”—and

6. See, e.g., Rena I. Steinzor & Alan D. Hornstein, *The Unplanned Obsolescence of American Legal Education*, 75 TEMP. L. REV. 447, 457-64 (2002) (academy’s pursuits increasingly esoteric, divorced from needs of practicing bar). In a foreword to the *Harvard Law Review*, Neal Katyal defends legal theory in legal scholarship for its eventual impact on legal outcomes, but also partially criticizes it for not attending to the professional needs of future lawyers. Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006). For related critiques of empirical legal studies as sometimes prompting the “why should we care” question, see Brian Leiter, *On So-Called “Empirical Legal Studies” and Its Problems*, BRIAN LEITER’S LAW SCH. REPORTS (July 6, 2010), <http://leiterlawschool.typepad.com/leiter/2010/07/on-socalled-empirical-legal-studies.html> (blog entry on empirical legal studies). The best general critical analysis of empirical legal scholarship to date is Pierre Schlag, *The Knowledge Bubble—A Diagnostic for Expertopia* (Mar. 9, 2016) (unpublished manuscript), <http://ssrn.com/abstract=2741144> (impossibility of claiming knowledge of any piece of legal datum without also occupying an internal perspective on it, thus losing the detachment necessary for empiricism; to do so renders empirical legal scholarship always paradoxical and fundamentally problematic).

7. KAHN, *Freedom*, *supra* note 1; Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

he might have added, on our own dime—if we’re intent on saving the world.⁸ We shouldn’t aim to do it in the classroom or in scholarship. We should aim, rather, in our scholarship, for truth, and for knowledge, within the confines of some academic discipline that embraces the goal, not for social betterment. If this complaint takes hold, then normative legal scholarship—by which I mean all legal scholarship that is of the form “the law is x but it should be y”—whether from the political left, right, or center, whether it is about the United States Constitution or international law or human rights law, or municipal traffic ordinances, whether it aims to improve law through doctrine, through statute, or by helping the law work its way pure, whether it is motivated by a sense of justice or a sense of injustice, by aesthetics, or by raw self-interest—all of that work is not just *bad* scholarship. Normative legal scholarship—by virtue of its normativity—is not scholarship at all. That’s the complaint I want to address here, which I’ll call the anti-normativity complaint. At the end of my comments, I’ll briefly address the fragility of critical legal scholarship, which I take to be a form of normative scholarship—but is for various reasons even more threatened, and far more criticized, in the current skeptical climate.

So, first, on normative legal scholarship: Both Stanley Fish and, for different reasons, Professor Paul Kahn of Yale Law School have argued that we just shouldn’t do it—we should not engage the work of advocating what the law should be.⁹ What, then, should legal scholars do, if we forgo saving the world on someone else’s dime and time? Although he doesn’t make the explicit analogy to law, I think there are two possible paths for legal scholarship to take if we take seriously the Fishian anti-normativity complaint—that we should save the world on our own time. First, legal scholars might return to an early-twentieth-century sense of their mission: Legal scholars could set about the task of correctly stating what the law IS. The aim of such work would be to state the law correctly, using the traditional doctrinal methods of law—“reasoned elaboration” of the doctrine, as Hart and Sacks suggested in their *Legal Process* materials,¹⁰ or, more grandly, perhaps, a herculean restatement of law that aims for an intergenerational and highly principled description of the existing law, as Ronald Dworkin urged through a fifty-year career.¹¹ No normative judgments—no claims about what the law should be—but rather a sincere attempt to employ one’s legalistic expertise to state the content of the law correctly. That alone can be a formidable task: It’s not easy to get the First Amendment right with respect to an ordinance or state law regulating hate speech or pornography in cyberspace,¹² or commercial speech on billboards

8. STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* (2012).

9. FISH, *supra* note 8, KAHN, *supra* note 1.

10. HENRY HART, JR., ALBERT SACKS, WILLIAMS ESKRIDGE, JR. & PHILIP FRICKEY, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (2006).

11. *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORKIN, *LAW’S EMPIRE* (1986, 1994); RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011).

12. *See, e.g.*, DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014).

along the highway.¹³ It's not easy to properly state—or predict—what judges may or may not do with the consideration doctrine when faced with a plaintiff who has reasonably relied to his detriment on a promise that was not part of a bargain, or how a judge might react to a plaintiff claiming under the tort of the intentional infliction of emotional distress in a jurisdiction that has not recognized such a tort, or whether a judge will modify, restrict or extend the holder in due course doctrine where a holder of a negotiable instrument is faced with the claim that it was granted as a part of a fraudulent transaction. If we forgo normativity, we could aim to be better chroniclers of the law; we could aim to state what the law in any of these contested areas truly is, where it's not clear or obvious or settled. That work can, after all, involve generational, herculean wisdom. It could certainly consume a career. It would add to our knowledge of the world, by clarifying what the law is.

We might, though, not find that satisfying; and, in fact, for decades now, explication of the law that “is” has not been central to the work of many scholars in the legal academy—although that does not, of course, mean that it is not work that more of us should be doing. Alternatively, if we find explication of the law unsatisfying, we could take part in the interdisciplinary work of some of our colleagues, either in the law schools themselves or in the rest of the university. We could contribute to the projects originating in and guided by other disciplines of better understanding our economy, our politics, our culture, our history, or our humanities canon by offering our specialized knowledge where those projects implicate law in some way. We would, then, be contributing to the “store of knowledge” about the law by adding legal analysis to projects themselves guided by the ideals and the methods of other disciplines within the university. The scholarly task would be to ensure that the particular legal claims that might be made in the larger historical, economic, political, or philosophical scholarly projects—originating from outside the field of law and outside the legal academy—are correct restatements of law. We could then help to situate law as the subject of scholarly projects in other disciplines, with some confidence that the law so situated is correctly described.

The aim of such scholarship would most assuredly be to improve our collective understanding of law. It would not be, however, to improve the law itself. We would be acting as legally trained experts, guides to the historians, empiricists, philosophers, economists, and humanists defining the project, and, as such, we would be embracing, with them, the “external perspective.” We would be doing so, of course, with legal sophistication, and that adds a lot. But we would not be doing so toward the end of improving the law that is, or of engaging with the legal materials from the internal perspective, or of informing our understanding of the law by our sense of justice. We would not be doing so, in short, as lawyers, committed to the project of law. We would be doing so as legally sophisticated outside analysts, observers, or scholars. If we shed the normative ambition of our work—our attempt to better the law—we would be more true to the aims of the larger academy, very traditionally

13. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

understood. We would forgo, however, the aims of the profession—we would not be aiming to either improve or preserve the law. If we want to be scholars, so this criticism goes, that is precisely what we should do. We can't be scholars if we're going to be lawyers, and perhaps vice versa as well.

I hope that gives the flavor of the “anti-normativity critique” I’m seeking to address. “Normative legal scholarship” is an oxymoron, because true scholarship cannot be normative. Much—maybe most—of what we call legal scholarship is normative, therefore, much of what is traditionally called legal scholarship is just not scholarship at all; it’s something else. Now, the aim of this critique is clearly not just to clear the air by advising a re-appellation. The aim of the critique, almost always, as far as I can tell, is to counsel against doing it.

Let me begin my response to the anti-normativity critique by noting the ubiquity or the ordinariness—the normalcy—of normative legal scholarship in the legal academy over the past century and a half. It’s all around us; it’s most of what we do. It comes in various forms, no doubt, at least half a dozen that I can count, but I’ll mention just two. First, what we have taken to calling (sometimes in the context of hiring or appointment decisions) “traditional doctrinal scholarship,” such as policy-based scholarship, or precedent-based scholarship—the scholarship often informally derided as “extended briefs”¹⁴—is clearly an example, perhaps the core example, of normative legal scholarship: It aims to state the law of something accurately, expose problems, and then proffer a reform or reformulation that better aligns with stated or sometimes unstated ideals. But normative legal scholarship is clearly not always of this form. Normative legal scholarship also includes what I’ll call “big idea” pieces, such as, for example, Benjamin Zipursky and John Goldberg’s pioneering work revitalizing an older understanding of tort law as a law of wrongs rather than the “law of accidents,”¹⁵ or the Israeli scholar Hanoch Dagan’s work unearthing the public-regarding theories of justice in contract,¹⁶ or Larry Kramer’s arguments from the beginning of the century about and against judicial review in constitutional law,¹⁷ or the work of a number of legal economists, such as Kaplow and Shavell, arguing that only our tax policies and not legal rules should aim for distributive justice.¹⁸ All of that work, and

14. Informally, and formally in faculty meetings, not in print.

15. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010) (arguing that tort law has lost its traditional meaning as concerned with legal wrongs, and has instead become centrally concerned with allocating accident costs efficiently).

16. HANOCH DAGAN, *RECONSTRUCTING AMERICAN LEGAL REALISM, AND RETHINKING PRIVATE LAW THEORY* (2013).

17. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2005).

18. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. LEGAL STUDIES 331 (2003); Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J. L. & ECON. 1 (1994) [hereinafter Kaplow & Shavell, *Accuracy*].

much else besides, is “normative legal scholarship,” as I understand the phrase. Likewise, the work of countless scholars, too many to name, putting forward claims that the Equal Protection Clause actually means *x* although its more often understood as meaning *y*, and because of that, our affirmative action policies are either forbidden by the Fourteenth Amendment or permitted by that same source, or indeed mandated by it. And so on. ALL of this scholarship in some form is about what law ought to be and not only what our law is: The Equal Protection Clause ought to be understood as requiring this; or the consideration doctrine properly read precludes enforcement of these sorts of contracts; or people who suffer purely emotional harms ought to be able to recover in tort, and so on. Scholarship of the form “the law is *x* but ought to be *y*”—whether the law in question is a traffic ordinance or the First Amendment or a human rights declaration or NAFTA—is the bread and butter of legal scholarship. It’s what we all think we know how to do; more than any other skill, inclination or ideal, it’s a skill we all share, an inclination we all harbor; it defines an ideal, even—a version of leaving the world a better place than we found it—for our scholarly lives in law. Normative legal scholarship may have become more exciting or more theoretical or more interdisciplinary or more sophisticated or more philosophical and so on over the past couple of decades, or maybe not. But it has been the bread and butter of legal scholarship now—defining what we do and, for many, perhaps most of us, what we ought to be doing—for over a hundred years. It still is. If we take the critique of normative legal scholarship on board, we will have to jettison the bulk of our scholarly work.

Now, the anti-normativity critique has been around for a while, but not quite as long a while, as traditional legal scholarship itself. It has had a number of strands. Roberto Unger, in his classic essay *The Critical Legal Studies Movement*, derided the normative work of his liberal legal colleagues for reifying our deepest commitments and stultifying radical critique of the legal status quo by engaging in only marginally reformist legal advocacy in their overly formalist legal scholarship.¹⁹ Law Professor Pierre Schlag from University of Colorado wrote a trenchant series of articles in the late 1980s attacking normative legal scholarship of all stripes as anti-intellectual, politically cowardly, and deeply subservient to a political overclass.²⁰ More recently, Yale’s Professor Kahn offered an extended and less politicized critique of normative legal scholarship in his book *The Cultural Study of Law*;²¹ he argued, basically, that “internal” legal scholarship pursues the wrong ideal: If legal scholars are going to contribute at all to the larger truth-seeking project of the academy, we simply must distance

19. Unger, *supra* note 1.

20. Schlag, *supra* note 7. See also Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991); Pierre Schlag, *Le Hors de Texte, C’est Moi’ The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195 (1989); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

21. KAHN, *supra* note 1.

ourselves from the legal culture that should be our subject matter, and we just cannot do that if we are simultaneously participating in it.²²

Since those essays were written, however, the anti-normativity critique has picked up new adherents: The legions of interdisciplinary scholars with training in other disciplines and the academy-wide hiring of the J.D./Ph.D. entry-level law professors may have broadened and deepened the appeal of the anti-normativity argument.²³ The typical J.D./Ph.D. scholars often increasingly eschews normative legal scholarship—not necessarily for the reasons given by Unger, Schlag, or Kahn, but rather by dint of training and outlook. The goal of the scholarship produced by many (certainly not all) of the J.D./Ph.D. scholars is not in any sense governed by, or even related to, the normative ambitions of the bench, the bar, or the legal academy, as it was once understood. For many such scholars, the goal is truth, not justice. The purpose of such work is understanding; it is not to make the law better.

What, though, is the case against normative legal scholarship? Is there still room in the legal academy for scholarship that aims to improve the law, or to preserve it, by resort to the tools, doctrines, insights, and values of law itself? If not, why not? What is the argument against it, beyond the question-begging claim that it simply is not truly “scholarly,” if its ambition is justice rather than truth?

As I hope my quick catalog of the anti-normativity critiques shows, a number of complaints are wrapped into the anti-normativity critique. Let me focus on just one, rarely explicitly articulated, but nicely captured in the spirit of Stanley Fish’s book title: “Save the World on Your Own Time.”²⁴ Fish’s complaint—that scholars in the humanities should not preach their politics in the classroom—was aimed at his colleagues in English departments, but legal scholars doing “normative scholarship” are unequivocally guilty of the same sin. While English professors may preach politics surreptitiously, law professors, particularly in their normative scholarship, overtly and unapologetically try to save the world in their (or our) scholarship. The complaint, in brief, captured by Fish’s title is that overtly normative legal scholarship is not scholarship at all, because it is “political.” It’s politics: It’s sloganeering, or it’s campaigning. And, like all political arguments, normative legal scholarship is not grounded in reason, but rather in passion or sentiment, or, even worse, in partisan politics. It’s not grounded in recognizably scholarly or academic values. Real scholarship needs to be, should be, or must be empirical, descriptive, dispassionate, reasoned. Arguments about the world of the “should” or arguments of the form “the law should be thus and so” are on the values side of a fact/value divide, and for that reason they are political, plain and simple, and, as such, have no place in legal scholarship. The recent move toward empiricism in legal scholarship has sharpened the contours of this complaint

22. *Id.*

23. Lynn LoPucki, *Dawn of the Discipline-based Law Faculty*, 65 J. LEGAL EDUC. 506 (2016).

24. FISH, *supra* note 8.

and has put pressure not only on normative scholarship but on other forms of legal scholarship as well, including critical scholarship—itsself a form of normative scholarship, but with more emphasis on critique than reform—legal theoretic work, and clinical scholarship. But it has unquestionably put the most pressure on normative legal scholarship: traditional legal-scholarly work, whether bounded by or informed by doctrine, policy, or political morality, that aims to make the law—hence the world—better.

Two otherwise dramatically different and even opposed practices *within* contemporary normative legal scholarship to some degree undercut the force of this critique: The first, to which I’ve already alluded, I’ll call the quasi-Dworkinian practice of normative scholarship, and the second I’ll call the quasi-Posnerian practice. Both, in very different ways, prescribe ways of doing normative legal scholarship that self-consciously avoids the charge of politicization implicit or explicit in the anti-normativity critique. Both prescribe ways of doing normative legal scholarship, in other words, that avoid the need to make explicitly moral or political claims about the way the law ought to be. Dworkinian normative legal scholarship, in brief, strives for true statements about what the law *is*, thus avoiding the complaint of undue politicization, but rests on the foundational claim that any such striving always rests, necessarily, albeit in part, on explicit or implicit moral or political principles embedded in the law itself. Even the driest and most purely “descriptive” of legal claims, Dworkin thought, with a good deal of justification, rest, and necessarily so, on claims about the legal ought, simply because the law itself, which the descriptive legal claims aim to capture, incorporates moral principle.²⁵ Saying that the consideration doctrine requires an exchange of values, for example, is saying something about which contracts should be enforced; saying that the First Amendment prohibits state law that in turn prohibits hate speech or pornography is saying something about the idealized content of the doctrine; saying that heirs inherit under the rules of intestacy is saying something about whether murderous heirs who kill for gain should or should not profit from their own wrong.²⁶ If Dworkin is right, then even purely descriptive analytic work that purports to do nothing but say what the law *is* is normative through and through; it’s turtles all the way down. Legal analysis—indeed every “statement of law”—just *is* normative, and necessarily so, if Dworkin’s early accounts of legal argumentation, contained in his near-iconic early book *Taking Rights Seriously*, are sound. Many scholars in the legal academy have considerable sympathy for the view, and the work of many others, whether self-consciously Dworkinian or not, that aims for principled statements or restatements of law that make law the best it can be, essentially bears witness to its plausibility. But note that nowhere in the Dworkinian account is the scholar, much less the judge, given rein to place his “own” political or moral views in the law being explicated, whether in the unsettled periphery or the

25. Dworkin defends this view in his classic work, RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 11.

26. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 11, at 86-87.

settled core of legal doctrine. The law, within Dworkinian scholarly as well as judicial practice, is not simply positivistically there to be molded according to the moral or political predilections of the scholar, judge, or lawyer. The moral principles, rather, are in the law being explicated.

The second practice, still within normative legal scholarship, that to some degree undercuts the anti-normativity critique, is “quasi-Posnerian.” The aim of the practice embodied by this sizable body of work, which goes far beyond the outer boundaries of the University of Chicago, is to tame or rationalize the normativity of traditional legal scholarship by recharacterizing normative claims as “cost-benefit analysis.” Quasi-Posnerian normative legal scholarship aims, in part, to transform what would otherwise be “moral” claims about what the law should be, or what the world should do or be, into claims of “fact”: the “benefits” and “costs” of various policies, laws, or rules drawn from cases.²⁷ The result, if this Posnerian translation works, is that “normative legal scholarship” can be both normative *and* rational and nonpolitical. Benefits and costs, after all, are facts of the matter, even if we do generally regard benefits as good and costs as bad. We can then make claims about what the law ought to be and avoid the claim that we are politicking in the classroom or on the pages of law reviews. We avoid the sting of the anti-normativity critique if we stick to our knitting, meaning, if we stick to the tabulation of costs and benefits, and whatever inferences might be fairly drawn from those tabulations.

Now, I believe, and have argued elsewhere, that “normative legal scholarship”—scholarship about what the law should be—including not only Dworkinian and Posnerian practices but also practices that are not Dworkinian and not Posnerian in the slightest—is important work, whether or not one wants to call it “scholarship.” It has great social value. It is—sometimes—moving, and persuasive, and insightful, and creative, and it quite often influences not only our law, but also our political environment and the world of ideas in the university. It is often, not just occasionally, the foundation of extrajudicial law reform movements as well as the basis for judicial interpretations of existing law, the claims of Roberts and Edwards to the contrary notwithstanding.²⁸ And, it is worth noting, it is also *sui generis*: It’s not done anywhere except in law schools. If the legal academy abandons these practices because of the sway of the anti-normativity critique, they will not be pursued elsewhere: the bench and bar, for different reasons, lack the time, resources, and detachment from client interests that is required to do it well, and the rest of the academy lacks the investment in the ideals that distinctively define the legal profession. If we forgo this work, our worlds, not only the legal world, but our social and cultural and political worlds, will be the worse for it. Again, I have argued this at length elsewhere.²⁹

27. See RICHARD A. POSNER, *ECONOMICS OF JUSTICE* (1981); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (8th ed. 2011). See also Kaplow and Shavell, *Accuracy*, *supra* note 18.

28. See Roberts, *supra* note 2, and Edwards, *supra* note 2.

29. See ROBIN WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* (2014); ROBIN WEST, *NORMATIVE JURISPRUDENCE: AN INTRODUCTION* (2011).

What I want to add here is simply that both our idealized and our real normative legal scholarship—the scholarship we aim to produce and that we should aim to produce, and that aims at a coherent explanation of what the law should be—extends well beyond the Dworkinian or Posnerian practices described above. Rather, normative legal scholarship can be implicitly and sometimes explicitly what both Dworkinian scholarship and cost-benefit scholarship try to ward off: utopian, overtly political, aspirational, heartfelt and impassioned. I'll call the practice I want to defend here "impassioned normativity." Impassioned, normative legal scholarship should also, of course, be humble: As is true of all scholarship, it should be open to objection and informed by our understanding of law and legal institutions. But normative legal scholarship is basically about *what justice requires*, and the degree to which law delivers on what justice requires or the degree to which law should deliver on what justice requires. If that's right—if normative scholarship is about what justice requires—then such scholarship is and should be rooted in passion, as well as intellect. If the charge against "normative scholarship" is that it is political, ethical, moral, emotional, and impassioned, rather than rational, reasoned, intellectual, descriptive, or empirical, I would suggest that rather than try to limit normativity or our defense of it to only those forms of it—the Dworkinian and Posnerian forms—that seem to be the most rational, we instead at least consider embracing the passionate root of justice, of our understanding of it, and hence of our normative scholarship. Legal scholarship is and should be about what justice requires. It therefore must be normative. To the degree, which I believe is considerable, that justice is itself a product of our passion, it must also, therefore, be impassioned. It is not captured in Posnerian fashion by costs and benefits, and it is not captured in Dworkinian fashion by the institutional decisions made in the past—by precedent, in other words, even as discerned by herculean judges.

Nevertheless, there is a problem with both impassioned and rationalist forms of normative scholarship, as well as with the defense of such scholarship, that is entirely different from the Fishian complaint that we are inappropriately and unethically trying to save the world on the law schools'—and hence the law students' and the taxpayers'—dime. When lawyers as well as law professors focus on what we might be able to do with law to bring the legal system more into alignment with what we think the law ought to be, we sacrifice, to some degree, our critical voice—precisely because our sense of the way law ought to be is so heavily influenced—nearly determined—by the bulk of the law that is, with much of that law that "is," being given, so to speak, a critical "pass." When we do that—when we focus on the normative—"when we all become pragmatists now," to paraphrase the paraphrase of the paraphrase—we internalize a huge loss. To correct for that loss, we in the legal academy and we as a society need legal scholarship that has no normative ambition whatsoever. We need such scholarship, however, not because, by virtue of having no reform-defined goal, it will thereby be better, or because it will therefore more dispassionately state what the law "is," or something truer—

because more dispassionate—about the economic or political meaning or consequences of law, or about our legal history or the role of law in political history. All of that may be true, but it's not the point. We need scholarship that has no normative ambition whatsoever so that we can better understand, and therefore better criticize, the world we inhabit. By focusing our work in the legal academy on our normative ambitions—by focusing on law as a means to justice—we risk losing, to some degree, our focus on law as a means of exploitation, legitimation, subordination, and suffering. We lose our focus, in other words, on law as a means to injustice, and on the role of law in promoting the ends of power, rather than the role of law in promoting the common good. Both rationalist and impassioned normative scholarship—scholarship that aims to show what the law ought to be—is in need of defense today against the presumed hegemony of the positive economic analysis of law, of descriptive or analytic legal scholarship, of purely historical scholarship, of treatise writing, and of some but not all interdisciplinary scholarship. I am happy to defend both impassioned and rationalist normative scholarship against those forces—not to displace any of those other forms of scholarship, but to keep the work at the table. But normative scholarship itself is *also* a threat to something even more marginalized by all of those forces, and that is critical legal scholarship, meant both narrowly, as it was defined in the seventies and eighties, and more broadly, meaning scholarship with no direct normative ambitions whatsoever, but with the aim of better understanding our own situation, which just might be so steeped in injustice that no legal fix in the world will come close to correcting it.

If we want to understand our currently unjust milieu, I believe, we need big, ambitious scholarship that is unabashedly critical and unabashedly non or even anti-normative. We in the legal academy need to aggressively carve out space for that work; because if we don't, it will disappear. If we want to use law to further the ends of justice, we also need big, ambitious scholarship that is unabashedly normative. We need to aggressively carve out space for that work as well. But make no mistake about it: If we want to understand how our law serves the ends of injustice, we need big, ambitious scholarship that is unabashedly non-normative and non-pragmatic, that doesn't aim for the legal fix, but aims instead for understanding. Right now, normative legal scholarship—even of the rationalist, Posnerian or Dworkinian variety and certainly of the non-Posnerian and non-Dworkinian—is under quite severe and even vicious attack. But critical scholarship is in even worse shape; it is so vilified it has shrunk in its scope and ambition. The legal academy has, to its credit, at different points over the past half-century been a welcoming environment for both normative and critical legal scholarship; the legal academy has at various times understood such scholarship as central to its mission and to its distinctive contribution. We need to become one again. Doing so won't be easy. In fact, it will require self-consciously resolute conviction.